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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 **JOSHUA HILD,**

C 075107 TEH

12 Plaintiff,

13 v.

14 **CALIFORNIA SUPREME COURT; CALIFORNIA**
15 **COURT OF APPEAL, SECOND APPELLATE**
16 **DISTRICT,**

17 Defendants.

NOTICE OF HEARING;
MOTION TO DISMISS FIRST
AMENDED COMPLAINT [Rule
12(b), F.R.C.P.]; POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

Date: January 14, 2008
Time: 10:00 a.m.
Ctm: 12 – 19th Floor
Judge: Hon. Thelton E. Henderson

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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

JOSHUA HILD,

Plaintiff,

v.

**CALIFORNIA SUPREME COURT;
 CALIFORNIA COURT OF APPEAL,
 SECOND APPELLATE DISTRICT,**

Defendants.

C 075107 TEH

**NOTICE OF HEARING; MOTION
 TO DISMISS FIRST AMENDED
 COMPLAINT [Rule 12(b), F.R.C.P.];
 POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Date: January 14, 2008
 Time: 10:00 a.m.
 Courtroom: 12 – 19th Floor
 Judge: Thelton E.
 Henderson

TO: PLAINTIFF JOSHUA HILD AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on January 14, 2008, at 10:00 a.m., in courtroom 12 of the United States Courthouse, located at 450 Golden Gate Avenue, San Francisco, California 94102, defendant California Supreme Court, will move for an order pursuant to Rule 12(b), Federal Rules of Civil Procedure, dismissing the First Amended Complaint and each of the claims alleged therein against moving defendant on the grounds that the Court is without subject matter jurisdiction; that this Court is without jurisdiction as to the State of California and the courts thereof; and that the First Amended Complaint fails to state a claim upon which relief can be granted against the State of California and its courts.

This motion is based on this Notice of Motion, the accompanying papers, all other papers and

1 pleadings on file herein, and on such oral and documentary evidence as may be presented at the
2 hearing, if any.

3 **MOTION TO DISMISS**

4 Defendant California Supreme Court moves to dismiss the First Amended Complaint on file
5 herein on the specific grounds that the Court is without subject matter jurisdiction, that this court is
6 without jurisdiction as to the State of California and the courts thereof; and that the First Amended
7 Complaint fails to state a claim upon which relief can be granted against the moving defendant.

8 WHEREFORE, moving defendant prays as follows:

- 9 1. That the First Amended Complaint on file herein and each claim for relief alleged therein
10 be dismissed as against moving defendant, and
11 2. That plaintiff be ordered to take nothing from moving defendant, and
12 3. That judgment be entered in favor of the moving defendant; and
13 4. For such other relief as the court deems just.

14 Dated: November 30, 2007

15 Respectfully submitted,

16 EDMUND G. BROWN JR.
Attorney General of the State of California

17 PAUL T. HAMMERNESS
18 Supervising Deputy Attorney General

19 /s/ Tom Blake
20 TOM BLAKE
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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The moving defendant is the Supreme Court of California.^{1/} The plaintiff is a teenager who won a state court personal injury verdict against a utility company in Orange County, California.

The money judgment was reversed by the California Court of Appeal. The Court of Appeal did not certify the decision for publication under Rule 8.1105, California Rules of Court.^{2/} Plaintiff petitioned the California Supreme Court for review. The state Supreme Court denied review (First Amended Complaint, hereafter "FAC," page 4: lines 24-25; page 20, line 8) and plaintiff is seeking certiorari in the U.S. Supreme Court (FAC, 20: 9-12).

Plaintiff amended his original complaint while the defendant's motion to dismiss was pending. To avoid the application of the *Rooker-Feldman* doctrine, plaintiff now purports to challenge only the citation rule, but the factual allegations of the operative complaint dwell on the Court of Appeal's application of the publication rule to his personal injury case and on the Supreme Court's decision not to grant review. Plaintiff's FAC now disavows his earlier request that the district court overturn the Court of Appeal's decision not to publish. See, FAC, 2: 8-27; 9: 9-12. However, to find in favor of plaintiff the district court would have to either hold that both the state Court of Appeal and the California Supreme Court erred in plaintiff's case, or rule on the facial validity of the California Rules of Court in the abstract.

ARGUMENT

I.

STANDARDS FOR MOTIONS TO DISMISS UNDER RULE 12(b), FEDERAL RULES OF CIVIL PROCEDURE.

A motion to dismiss a complaint may be made on the ground of failure to state a claim upon which relief can be granted. Rule 12(b), Fed. R. Civ. P. 12(b). On a Rule 12(b)(6) motion, the

1. The First Amended Complaint does not mention the Court of Appeal, Second Appellate District. As the First Amended Complaint supercedes plaintiff's former pleading, the state Court of Appeal is no longer a party to this action.

2. All further references to Rules are to California Rules of Court. A copy of Title 8, Division 5 [publication of appellate opinions] of the California Rules of Court is Exhibit A.

burden of going forward is on the defendant, and the court must accept as true all material allegations in the complaint. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). However, the court need not accept conclusory allegations or unreasonable inferences. *In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (9th Cir. 1993); *Transphase Systems, Inc. v. Southern California Edison Co.*, 839 F. Supp. 711, 718 (C.D. Cal. 1993).

Although leave to amend is to be liberally granted, where it is clear that amendment cannot cure the deficiencies of the complaint, dismissal without leave to amend is proper. *Steckman v. Hart Brewing Co.*, 143 F.3d 1293, 1296 (9th Cir. 1998).

II.

THE PLAINTIFF LACKS STANDING.

The FAC avers (at page 2, lines 8-9) that, "The gravamen of this action lies solely with the general unconstitutionality of California Rules of Court Rule 8.1115(a) as written . . . " The plaintiff

elaborates in the same paragraph, "Plaintiff brings this action solely to declare C.R.C. Rule 8.1115(a) unconstitutional as written, but specifically does not seek review by this court of the underlying unpublished decision itself, the facts of which are set forth herein for context purposes and to establish Plaintiff's standing . . . " FAC, 2: 17-21. The plaintiff seeks no "legal or equitable relief of any kind, including damages and/or injunctive relief," other than a declaration that the state courts may not proscribe the citation of certain opinions. FAC, 2: 23-27.

But if plaintiff is not seeking redress of some particular injury to him, such as the reversal of a specific court judgment, he lacks standing:

"Under Article III of the Constitution, a plaintiff must demonstrate the existence of a 'case or controversy' in order to have standing to assert an action in federal court. (Citations.) To meet this requirement, plaintiffs must show 'at an irreducible minimum that they personally have suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . . and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.'" *Maguire v. City of American Canyon*, 2007 WL 1875974, p. 5 (N.D. Cal. 2007).

In the instant matter, plaintiff's only particularized, personal injury is that his money judgment against a utility company was reversed by the state Court of Appeal. The operative complaint disavows any interest in having the district court reverse that state of affairs, but

1 overthrowing the State Supreme Court's carefully-drawn rules regulating the publication of opinions
 2 and shaping the state's decisional law is of no direct, concrete, particularized benefit to plaintiff
 3 unless the Court of Appeal decision against him is reversed.

4 Plaintiff concedes that the California Supreme Court has considered and denied his Petition
 5 for Review. FAC, 4: 24-25; 20: 8. He is petitioning the U.S. Supreme Court for certiorari. FAC
 6 p. 20, lines 9-12. Although plaintiff contends that his chances of state Supreme Court review was
 7 curtailed, and speculates that the California Supreme Court would have been more likely to grant
 8 review if the decision below had been published, he does not allege that throwing out the Rules of
 9 Court governing citation of cases and creation of precedent would revive his money judgment.
 10 Plaintiff does not even directly allege that he would have succeeded in reversing the Court of Appeal
 11 decision if the California Supreme Court had granted review. Failure to show that the relief he seeks
 12 would afford him a particularized, personal, and concrete remedy of an injury is fatal.

13 In *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817 (9th Cir. 2002), the
 14 plaintiff was an attorney who sued the Ninth Circuit for a declaration that Circuit Rule 36-3 was
 15 unconstitutional. That rule, as then written, essentially provided that neither parties nor courts in the
 16 Ninth Circuit may cite to an unpublished disposition as precedent. The Ninth Circuit held that the
 17 *Schmier* plaintiff failed to allege a legally cognizable injury, as required by the standing doctrine,
 18 where he did not allege that he personally had suffered sanctions or harm from an inability to rely
 19 on an unpublished opinion. The Ninth Circuit further held that he could not establish standing based
 20 on his interest in seeing the federal courts perform their duties well. The Ninth Circuit noted that
 21 the U.S. Supreme Court has repeatedly admonished against taking jurisdiction over cases involving
 22 something less than a "personal," "particularized" and "concrete" injury. *Schmier, supra*, 822.

23 By amending his complaint to avoid overtly petitioning for review of his own loss in the state
 24 appellate courts, the plaintiff attempts to avoid operation of the *Rooker-Feldman* doctrine, *infra*,
 25 which precludes review of state court decisions in the federal district courts. But he does so at the
 26 cost of losing standing to sue in this court. Plaintiff apparently reasons that, if this court invalidates
 27 the California Supreme Court's carefully-drawn state-wide rules on citation of precedent, the
 28 decision against him will become precedent and, as precedent, be more likely to be reviewed by the

1 U.S. Supreme Court. Presumably, plaintiff hopes that, for the reasons detailed in his detailed FAC,
 2 the Court of Appeals decision against him would then be reversed. However, a chain of speculation
 3 does not establish federal standing. In *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092 (9th
 4 Cir., 2000), the Ninth Circuit held that Article III standing requires an injury that is “actual or
 5 imminent, not “conjectural” or “hypothetical:”

6 “In *Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d
 7 1327 (9th Cir.1994) (per curiam), we held that a company unlawfully
 8 denied the opportunity to compete for a cable franchise lacked
 9 standing to bring damage claims against the city for profits the
 10 company would have received had it been awarded a franchise. *Id.* at
 11 1333-34. We concluded the alleged injury was too uncertain because
 12 it depended on the ‘very speculative assumption’ that the company
 13 would have received the franchise as the most qualified competitor
 14 and ‘would have built and operated a profitable cable franchise ... if
 15 it had only been given the chance.’ *Id.* at 1334. Similarly, the other
 16 students, parents and others likely to attend future Oroville
 17 graduations lack standing because the likelihood that they will suffer
 a future injury depends upon the highly speculative assumption that
 a student seeking to give a sectarian speech or prayer will be chosen
 as valedictorian or salutatorian, or will be elected by classmates to
 deliver an invocation. (Footnote omitted.) This threat of injury is
 neither real nor immediate. Cf. *Eggar v. Livingston*, 40 F.3d 312,
 316-17 (9th Cir.1994) (holding that plaintiffs alleging city had policy
 of imprisoning indigent defendants without appointing counsel did
 not have standing to bring declaratory or injunctive claims because
 the likelihood that they would suffer future injury relied on a “‘chain
 of speculative contingencies’”) (quoting *Nelsen v. King County*, 895
 F.2d 1248, 1252 (9th Cir.1990)).

18 *Cole v. Oroville Union High School Dist.*, *supra*, 228 F.3d 1092, 1100.

19 Recently, in *American Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010 (9th Cir.,
 20 2006), the Court of Appeals held that, “The ‘irreducible constitutional minimum of standing’
 21 contains three parts: (1) injury in fact; (2) causation; and (3) likelihood that the injury will be
 22 redressed by a favorable decision.” *American Civil Liberties Union, supra*, 1015, citing *Lujan v.*
 23 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, the operative complaint fails to allege
 24 causation or a likelihood that plaintiff’s injury (the reversal of his money judgment) would be
 25 redressed by invalidating the California Rules of Court governing publication.

1 III.

2 **UNDER THE *ROOKER-FELDMAN* DOCTRINE, THE DISTRICT COURT**
 3 **LACKS JURISDICTION TO REVIEW STATE APPELLATE DECISIONS.**

4 Plaintiff is dissatisfied with the results of the state appellate process: the appellate courts
 5 reversed a large judgment in his favor. However, plaintiff now avers that he seeks only a declaration
 6 that Rule 8.1115(a), California Rules of Court, is "void" on its face. FAC 14: 3-4. Plaintiff's position
 7 now seems to be that he has been deprived of his constitutional rights because unknown other
 8 litigants, in the future, will not be able to cite the unpublished decision that was adverse to him.

9 However, reading the FAC's allegations of fact rather than its legal conclusions, plaintiff
 10 appears to be again asserting that he was injured because the Supreme Court (wrongly) didn't accept
 11 his case for review as a result of the Court of Appeal (wrongly) deciding not to publish its opinion.
 12 Although plaintiff asserts that the state Supreme Court's non-citation rule "axiomatically deprives
 13 litigants in civil cases resulting in unpublished decisions of their right to judicial review" (FAC
 14 11:13-15), his true position is revealed in his subsequent assertion that "such litigants cannot meet
 15 the review criteria under Rule 8.500(b)." FAC 11:16-17. However, Rule 8.500(b) is permissive,
 16 not mandatory; it provides that the state Supreme Court may order review "[w]hen necessary to
 17 secure uniformity of decision or to settle an important question of law." The federal district court
 18 has no jurisdiction to rectify the asserted injury, because to do so it would have to find that the state
 19 courts were wrong in the plaintiff's case, or -- as noted above -- rule on the constitutionality of the
 20 state Rules of Court that plaintiff lacks standing to attack.

21 Although plaintiff disavows a current interest in violating the *Rooker-Feldman* doctrine (see,
 22 FAC 9: 9-12), four^{3/} of the FAC's 14 pages are devoted to re-alleging the purported errors of the
 23 Court of Appeal in deciding his personal injury case, in not publishing it as precedent under the
 24 California Rules of Court, and of the state Supreme Court in denying review. Indeed, at FAC page
 25 9, lines 13-17, "[p]laintiff alleges that his right to review by the CALIFORNIA SUPREME COURT
 26 of the underlying unpublished . . . [sic.] was curtailed by direct causal operation of the non-citation
 27

28 3. FAC, page 5, line 17 through page 9, line 17.

1 rule”

2 But federal district courts are not appropriate forums for the redetermination of state appellate
3 decisions. The proper avenue of appeal is to the California Supreme Court and thereafter, as plaintiff
4 pleads that he is now pursuing, to the United States Supreme Court.^{4/} Under 28 U.S.C. sec. 1257,
5 jurisdiction to review state court judgments is with the United States Supreme Court only, not with
6 the lower federal courts. The district court is therefore powerless to review decisions of the
7 California Court of Appeal. See *Barry v. Blower*, 864 F.2d 294, 300 (3rd Cir. 1988) [principles of
8 federalism preclude a federal court's direct interference with a state court's conduct of state court
9 litigation]. The federal district courts lack jurisdiction to review state court judgments. *Allah v.*
10 *Superior Court of the State of California*, 871 F.2d 887, 890-91 (9th Cir. 1989).

11 Federal district courts are not appellate tribunals empowered to review state court actions for
12 alleged errors. *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S.
13 281, 296 (1970). A federal court has no jurisdiction over issues that are "inextricably intertwined"
14 with allegations underlying the judgment of a state court. *District of Columbia Court of Appeals v.*
15 *Feldman*, 460 U.S. 462, 486-87 (1983). If plaintiff has any standing at all on the basis of his factual
16 allegations in the FAC, his claims are "inextricably intertwined" because the district court would be
17 required to "scrutinize not only the challenged rule itself, but the [state court's] application of the
18 rule..." *Rabatos v. Colorado Supreme Court*, 746 F.2d 1429, 1433 (10th Cir.), *cert. den.*, 471 U.S.
19 1016 (1984). As the Supreme Court held in *Feldmann, supra*, 460 U.S. at 486-87, the district courts
20 exercise only original jurisdiction. The U.S. Supreme Court has exclusive jurisdiction to review
21 state decisions. *Id.* at 486. See also 28 U.S.C. §1257.

22 The U.S. Supreme Court recently affirmed that the *Rooker-Feldman* doctrine applies where
23

24 4. As the district court noted in *Louis v. Supreme Ct. of Nevada*, 490 F.Supp. 1174
25 (D.Nev. 1980):

26 "If the constitutional issues had been raised in the State Supreme Court and decided
27 erroneously, appeal to the United States Supreme Court would have been the only
28 available procedure to correct the error; the jurisdiction of the U.S. District Courts
is original only, and not appellate. [citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413,
44 S.C. 149, 68 LED. 362 (1923)."

Louis, supra, 490 F.Supp. 1174, 1179.

the federal plaintiff seeks to “overturn an injurious state-court judgment.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292 (2005).

In *K.anna v. State Bar of Cal.*, *supra*, ___ F.Supp.2d ___, 2007 WL 2611732, this court held that, while the *Rooker-Feldman* doctrine is not broad in application, the principle clearly applies where, as here, plaintiff directly attacks a state court judgment:

“More recently, in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S.C. 1517, 161 L.Ed.2d 454 (2005), the Supreme Court, consistent with the Ninth Circuit's interpretation of *Rooker-Feldman*, emphasized that the doctrine was limited in scope, being ‘confined to ... *cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.*’”

Khan, *supra*, ___ F.Supp.2d __ (emphasis added).

The district courts lack jurisdiction to review state court determinations even when the challenge to the state court decision involves federal constitutional issues. *Branson v. Nott*, 62 F.3d 287, 291-92 (9th Cir. 1995); *Worldwide Church of God v. McNair*, 805 F.2d 888, 890-891 (9th Cir. 1986). Characterizing the action as a general constitutional challenge, such as by styling a state court decision not to certify an opinion for publication an “unconstitutional doctrine of ‘selective prospectivity’ by facilitating the rendering of unassailable, unreviewable, result-oriented decisions ...” (FAC., 9, 26-27) is of no avail to plaintiff. District courts have no jurisdiction where it appears on the face of the complaint that the action seeks, in effect, “a review of the merits of a state court action.” *Branson*, *supra*, 62 F.3d at 292. Indeed, the *Branson* court went further, holding that a district court may *sua sponte* sanction such a frivolous and abusive attempted use of judicial process by awarding sanctions under Rule 11, Federal Rules of Civil Procedure. *Branson*, *supra*, 62 F.2d 287, at 293-94.

IV.

UNDER THE *YOUNGER* DOCTRINE, THE DISTRICT COURT SHOULD ABSTAIN.

The abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 42 (1971) militates for dismissal of this matter. The *Younger* abstention doctrine bars federal courts from interfering with pending state court proceedings. In *Younger*, the U.S. Supreme Court reversed a district court's determination that the California Criminal Syndicalism Act, under which defendant had been indicted, was unconstitutionally vague and over-broad. The Supreme Court held that the federal court could not enjoin the proceedings because the state criminal action was still pending. *Ibid*.

A. All Conditions for *Younger* Abstention Are Met.

Younger abstention is triggered where the state proceedings interfered with are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. *H.C. v. Koppel* 203 F.3d 610, 613 (9th Cir. 2000); *Parrington v. Gedan* 864 F.2d 464, 470, (9th Cir. 1989) citing *Middlesex County Ethics Committee v. Garden State Bar Assn.* 457 U.S. 423, 432 (1982); *World Famous Drinking Emporium, Inc. v. City of Tempe* 820 F.2d 1079, 1081 (9th Cir. 1987). All three conditions are met in the present action.

The first condition is readily met because plaintiff, having unsuccessfully petitioned the California Supreme Court for review, is petitioning the United States Supreme Court for certiorari (FAC, 9: 9-12). His state court case is therefore continuing before the high court.

The second condition for abstention is that the state proceedings implicate important state interests. The correct adjudication of the underlying high-dollar civil case is a matter of significant state interest and, more importantly, the integrity of the system for managing California's decisional law is an important state interest. See *Report and Recommendations*, November 2006, California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, appended to plaintiff's First Amended Complaint as Exhibit 3.

The third condition for *Younger* abstention is that the state proceedings provide an adequate forum for litigating federal claims. A state proceeding provides an adequate forum for *Younger* abstention purposes unless state procedural law clearly bars interposition of the federal claims.

1 *Penzoil Co. v. Texaco, Inc.* (1987) 481 U.S. 1, 14; *Dubinka v. Judges of the Superior Court* (9th Cir.
 2 1994) 23 F.3d 218, 224. Here, the plaintiff does not identify any federal claim that he is or would
 3 be precluded from adjudicating. It is plaintiff's burden to show that he would be barred from raising
 4 federal claims in the state proceedings. *Penzoil, supra*, 481 U.S. at 14; *Dowden v. City of*
 5 *Sacramento*, 40 F.Supp.2d 1146, 1149 (E.D.Cal. 1999). Plaintiff alleges no such impediment.
 6 Moreover, the Supreme Court has rejected any presumption that state courts will not safeguard
 7 federal constitutional rights. *Middlesex County Ethics Committee v. Garden State Bar Association*
 8 457 U.S. 423 (1982).

9 **B. There Is No Right to a Second Level of Appellate Review by the Supreme Court.**

10 The plaintiff alleges as a constitutional violation that his petition for review in the California
 11 Supreme Court was not granted, and asserts that the denial was due to a lesser likelihood of review
 12 for unpublished decisions.^{5/} However, California law provides for only one appeal as a matter of

13 right, and there is no federal right to appeal. In the instant case, the plaintiff has had the mandated
 14 appeal by California law, although he did not like the result. The plaintiff does not, and cannot,
 15 assert that there is any constitutional right to have a second level of appeal in the state Supreme
 16 Court, any more than he could assert a right to have his case heard in the United States Supreme
 17 Court. See *Porter v. United Services Automobile Ass'n*, 90 Cal.App.4th 837 (2001):

18 "Subject to certain narrow constitutional limitations, there is no right
 19 to appeal. (*Leone v. Medical Board* (2000) 22 Cal.4th 660, 665-670,
 20 94 Cal.Rptr.2d 61, 995 P.2d 191; *Lindsey v. Normet* (1972) 405 U.S.
 21 56, 77, 92 S.Ct. 862, 31 L.Ed.2d 36.) Rather, absent constitutional
 22 restrictions, the right to appeal is wholly statutory. (*People v. Chi Ko*
 23 *Wong* (1976) 18 Cal.3d 698, 709, 135 Cal.Rptr. 392, 557 P.2d 976
 24 disapproved on another point in *People v. Green* (1980) 27 Cal.3d 1,
 25 33-35, 164 Cal.Rptr. 1, 609 P.2d 468 ["a judgment or order is not
 26 appealable unless expressly made so by statute"]; *Skaff v. Small*
 27 *Claims Court* (1968) 68 Cal.2d 76, 78, 65 Cal.Rptr. 65, 435 P.2d 825
 28 ["a party possesses no right of appeal except as provided by
 statute"].")"

26 5. Although plaintiff asserts a "deliberate" (FAC, 5: 1) use of an unpublished opinion and
 27 a "de facto policy of refusing review" of unpublished civil opinions (FAC, 12: 22-23), the California
 28 Rules of Court in question are reasonably and rationally designed to non-publish cases of lesser
 precedential value, while the state's highest court necessarily gives priority to the review of the cases
 involving "an important question of law." CRC 8.500(b).

1 *Porter v. United Services Automobile Ass'n, supra*, 90 Cal.App.4th 837 at 839-840.

2 V.

3 **THE ELEVENTH AMENDMENT BARS THIS SUIT AGAINST THE STATE**
4 **COURTS.**

5 **A. The Eleventh Amendment Precludes Federal Court Jurisdiction in This Suit Against**
6 **State Courts.**

7 The Eleventh Amendment of the United States Constitution provides:

8 "[T]he judicial power of the United States shall not be construed to
9 extend to any suit in law or equity, commenced or prosecuted against
10 one of the United States by citizens of another state"

11 U.S. Const. Amend. XI.

12 The Eleventh Amendment bars suits against states and their agencies for equitable relief as
13 well as for damages. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). A state's
14 sovereign immunity extends to state agencies and to state officers, who act on behalf of the state and
15 can therefore assert the state's sovereign immunity. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy*,
16 506 U.S. 139, 142-46 (1993); *Pennhurst, supra*, 465 U.S. at 101.

17 The Eleventh Amendment bars suits which seek either damages *or injunctive relief* against
18 a state, an arm of the state, its instrumentalities or its agencies. *Durning v. Citibank, N.A.*, 950 F.2d
19 1419, 1422-23 (9th Cir. 1991). A state court is an "arm of the state" for purposes of Eleventh
20 Amendment immunity. *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir.1995). The Supreme
21 Court is a court of the State of California. Cal. Const., art. 6 sec. 2 (West 1987). In *Greater Los*
22 *Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987), plaintiff sought
23 monetary, injunctive and declaratory relief after county officials refused to provide sign-language
24 interpreters at public expense. Holding that the Eleventh Amendment precluded equitable relief
25 against the state court, the Ninth Circuit emphasized that the state's trial court is a state agency:

26 "... state case law and constitutional provisions make clear that the
27 Court is a State agency. See Cal. Const. art. 6 §§ 1, 5 (West Supp.
28 1986); *Sacramento & San Joaquin Drainage Dist. v. Superior Court*,
196 Cal. 414, 432, 238 P. 687, 694 (1925). The official name of the
court is the Superior Court of the State of California; its geographical
location within any particular county cannot change the fact that the
court derives its power from the State and is ultimately regulated by
the State."

1 *Greater Los Angeles Council, supra*, 812 F.2d at 1110.

2 The Ninth Circuit therefore held that “We conclude that a suit against the Superior Court is
3 a suit against the State, barred by the Eleventh Amendment.” *Ibid.* The Ninth Circuit elaborated on
4 the underlying policy consideration:

5 “The judicial process is an arena of open conflict, and in virtually
6 every case there is, if not always a winner, at least one loser. It is
7 inevitable that many of those who lose will pin the blame on judges,
prosecutors, or witnesses and will bring suit against them in an effort
to relitigate the underlying conflict.”

Id., 1108.

8 Importantly, the Court of Appeals further held that “Since the eleventh amendment by its
9 terms bars suits against a state in ‘law or equity,’ *our holding necessarily applies also to plaintiffs’*
10 *claims against the Superior Court for injunctive and declaratory relief.*” (Emphasis added) *Ibid.*,
11 fn 10.

12 Given the bar of Eleventh Amendment immunity, plaintiff’s equitable claims against the
13 Supreme Court of California are barred.

14
15 **B. The Eleventh Amendment Also Precludes Federal Court Jurisdiction as to Plaintiff’s
16 Claims for Costs or Money Damages Against State Courts.**

17 To the extent that the plaintiff seeks relief on a theory that judicial errors in the state courts
18 entitle him to recover money for costs, he also is barred by the Eleventh Amendment. Plaintiff
19 alleges that the California Supreme Court is liable for incorrectly deciding his personal injury action
20 and for not certifying the result for citation as precedent in later cases. His suit is directed against
21 the state courts, and therefore against the State itself, and it is therefore barred by the Eleventh
22 Amendment. The Eleventh Amendment bars such suits for money damages in federal court unless
23 the defendant has waived immunity or Congress has exercised its power under the Fourteenth
24 Amendment to override that immunity. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66
25 (1967). Neither exception is applicable here.

1 VI.

2 **THE ANTI-INJUNCTION ACT PRECLUDES THE RELIEF SOUGHT BY**
 3 **PLAINTIFF.**

4 To the extent that plaintiff seeks to enjoin the defendant, the State of California's highest
 5 court from enforcing rules adopted to govern the creation of precedent in state courts, such an
 6 injunction would not only go to controversies not ripe but also would expressly violate the Federal
 7 Anti-Injunction Act. That statute, 28 U.S.C., sec. 2283 provides that "A court of the United States
 8 may not grant an injunction to stay proceedings in a State Court except as expressly authorized by
 9 Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its
 10 judgments." Here, there is no express authorization of Congress, no need to preserve this court's
 11 jurisdiction, and no federal judgment to effectuate.

12 VII.

13 **TITLE 8, DIVISION 5 OF THE CALIFORNIA RULES OF COURT IS NOT**
 14 **CONSTITUTIONALLY INFIRM.**

15 Although there is no reason for this court to reach the merits of plaintiff's allegations that
 16 Rule 8.1115 is unconstitutional, it may be noted in passing that every appellate court, state or
 17 federal, that has considered the validity of the state's publication and citation rules⁶ has concluded
 18 that California's system for managing the creation and citation of precedent is valid.

19 **A. California State Appellate Courts Have Found the State's Publication Rules**
 20 **Constitutional.**

21 In *Schmier v. The Supreme Court of California*, 78 Cal.App.4th 703 (2000), the California
 22 Court of Appeal approved the trial court's denial of an injunction against operation of what were
 23 then Rules 976-979:

24 "To the extent appellant suggests that the common law of England
 25 requires that all appellate decisions will be published and may be
 26 cited as authority, such a rule is inconsistent with the Constitution
 27 and laws of this state, including the rules of court, which have the
 28 force of positive law. [Citation.] 'As a rule of conduct, [common

26 6. Formerly Rule 977 et seq., California Rules of Court, now renumbered as Rule 8.1105
 27 et seq. A January 1, 2007 amendment, adopted June 30, 2006 as part of the reorganization of the
 28 California Rules of Court, renumbered the rules, and made nonsubstantive changes. (Title 8,
 Division 5 of the California Rules of Court is attached as Exhibit A, supra.)

law] may be changed at the will of the [L]egislature, unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. [Citation.]' [Citation.] By specifically empowering the Supreme Court to determine which opinions of the Court of Appeal are appropriate for publication, the Legislature and the electorate have clearly disclosed an intent that the decisional law of this state does not require publication of every opinion of the intermediate appellate courts. Rather, the Supreme Court appropriately determines by selective publication the evolution and scope of this state's decisional law.

"Nor do the rules contravene the doctrine of *stare decisis*, which obligates inferior courts to follow the decisions of courts exercising superior jurisdiction. [Citation.] Although the doctrine embodies an important social policy by representing an element of continuity in law and serving the psychological need to satisfy expectations, it is a principle of judicial policy, not a rule of constitutional or statutory dimension. (See *Helvering v. Hallock* (1940) 309 U.S. 106, 119 [60 S.Ct. 444, 451, 84 L.Ed. 604, 125 A.L.R. 1368].) Therefore, the Supreme Court—California's highest court—is the appropriate body to establish policy for determining those Court of Appeal opinions entitled to the precedential value of the *stare decisis* doctrine.

Schmier, supra, 78 Cal.App.4th 703, 709-710.

For example, in *People v. Superior Court (Clark)* 22 Cal.App.4th 1541 (1994), the Court of Appeal issued a writ of mandate to reinstate special circumstances allegations in a murder prosecution. Defendants alleged that the law of special circumstances had been rendered uncertain after simultaneous passage of Propositions 114 and 115, followed by a Court of Appeal opinion that was depublished after appearing in the advance sheets. Accepting the validity of the publication rules, the *Clark* court summarized the operation of the rules:

"In short, while an appellate court may certify (i.e., approve) an opinion for publication, the ultimate decision as to whether the opinion shall be published rests with the Supreme Court."

People v. Superior Court (Clark), supra, 22 Cal.App.4th 1541, 1547-48.

In *In re Williams*, 69 Cal.App.3d 840, 842 (1977), the Court of Appeal ordered the Adult Authority to consider narcotics trafficker Williams for parole without regard to a five-year minimum incarceration period that it found constitutionally disproportionate. The court recognized that the precedential value of an earlier opinion had "died aborning when the Supreme Court inexplicably ordered the [earlier] opinion not to be published," but the *Williams* court did not cast doubt on the authority of the Supreme Court to eliminate the case as a citable precedent.

B. Federal Appellate Courts Have Found the State's Publication Rules Constitutional.

Similarly, the federal courts that have considered the question of selective publication have approved publication rules. (The Ninth Circuit and other federal jurisdictions have only recently changed their citability and publication rules as a policy choice.) For instance, the Ninth Circuit upheld the circuit's publication rule in *Schmier v. Ninth Circuit Court of Appeal, supra*, 279 F.3d 817, decided chiefly on standing grounds as noted above. Like California's then-Rule 977 (renumbered as Rule 8.11), the Ninth Circuit's Rule 36-3 provided that dispositions other than opinions and orders designated for non-publication were not precedential and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

After the Ninth Circuit's *Schmier* decision, Judge Kozinski of that court wrote learnedly and with approval of the California depublication rules. In *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), the Ninth Circuit affirmed the constitutionality of the its then-parallel Ninth Circuit Rule

36-3. In footnote 30, the Ninth Circuit Court of Appeals held:

"Some state court systems apply the binding authority principle differently than do the federal courts. In California, for example, an opinion by one of the courts of appeal is binding on all trial courts in the state, not merely those in the same district. . . . California's management of precedent differs from that of the federal courts in another important respect: The California Supreme Court may "depublish" a court of appeal opinion--i.e., strip a published decision of its precedential effect. See Cal. R. Ct. 976(c)(2); Steven B. Katz, California's Curious Practice of "Pocket Review", 3 J.App. Prac. & Process 385 (2001). California's depublication practice shows that it is possible to adopt more aggressive methods of managing precedent than those used by the federal courts."

Hart, supra, 266 F.3d 1155, 1174, fn 30.

C. The Federal Selective Prospectivity Doctrine Does Not Invalidate Title 8, Division 5 of the California Rules of Court.

Plaintiff's citation (FAC, 8: 19-28) of *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) is inapposite. As the Ninth Circuit observed in *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993):

"*Beam* stands for the proposition that once the Supreme Court has announced a new rule and applied it to the parties before the Court, that new rule must be applied by the courts retroactively to all pending cases not barred by procedural requirements or res judicata. 501 U.S. at ----, 111 S.Ct. at 2448. The *Beam* Court rejected the

possibility that courts could switch legal rules on and off by applying new rules on a selectively prospective basis; courts cannot 'apply a new rule in the case in which it is pronounced, [but] then return to the old one with respect to all others arising on facts predating the pronouncement.' *Id.* at ----, 111 S.Ct. at 2444."

Gray, supra, 989 F.2d at 1571-72.

The *Beam* case, involving application of a state liquor tax, was a plurality decision in which the justices differed greatly in their rationale. Justice Souter's opinion, joined only by Justice Stevens, was based on the principles of *stare decisis*, equality, and the rule of law generally. However, Justices Blackmun and Scalia, in separate opinions joined by Justice Marshall, concurred in the judgment on the grounds that Article III prohibited prospectivity for the Supreme Court's own decisions. Thus, *Beam* does not preclude selective prospectivity as a constitutional matter. See *Atlantic Richfield Co. v. U.S. Dept. of Energy*, 977 F.2d 611 (Em.App., 1992). The Ninth Circuit has held, "It is a "fundamental misconception that *Beam* was a constitutionally-based decision. But even if *Beam* were constitutionally based, it addressed the Court's Article III powers and not Congress' Article I powers." The selective prospectivity doctrine can never be applicable to a Court of Appeal's unpublished decision, as that unpublished decision—by operation of the very ruler ostensibly being challenged here—does not establish a new rule of law.

CONCLUSION

For the foregoing reasons, and because amendment would be patently futile, the First Amended Complaint should be dismissed with prejudice.

Dated: November 30, 2007.

Respectfully submitted,

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